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Permanent Forum on Indigenous Issues

Tenth session
New York, 16-27 May 2011

Provisional agenda

1. Election of officers.
2. Adoption of the agenda and organization of work.
3. Follow-up to the recommendations of the Permanent Forum:
   (a) Economic and social development;
   (b) Environment;
   (c) Free, prior and informed consent.
4. Human rights:
   (a) Implementation of the United Nations Declaration on the Rights of Indigenous Peoples;
   (b) Dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other United Nations human rights mechanisms.
5. Half-day discussion on Central and South America and the Caribbean.
6. Comprehensive dialogue with United Nations agencies and funds.
7. Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues.
8. Draft agenda for the eleventh session of the Permanent Forum.
9. Adoption of the report of the Permanent Forum on its tenth session.

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Permanent Forum on Indigenous Issues
Tenth session
New York, 16-27 May 2011
Item 4 (a) of the provisional agenda*
Human rights: implementation of the United Nations Declarations on the Rights of Indigenous Peoples

Response to comments made by some Member States on the annex to the report of the Permanent Forum on its eighth session (E/2009/43) at the general segment of the substantive session of the Economic and Social Council, in July 2009

Submitted by Permanent Forum members Lars-Anders Baer, Bartolomé Clavero Salvador, Michael Dodson and Carsten Smith

Summary

At its ninth session, the Permanent Forum decided to appoint Forum members Lars-Anders Baer, Bartolomé Clavero Salvador, Michael Dodson and Carsten Smith to prepare a paper responding to the comments made by Member States on the annex to the report of the Permanent Forum on its eighth session (E/2009/43) at the general segment of the substantive session of the Economic and Social Council, in July 2009.

* E/C.19/2011/1.

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A. General comment of the Permanent Forum to article 42

1. In the report of the Permanent Forum on Indigenous Issues on its eighth session (E/2009/43), held from 18 to 29 May 2009, the Forum adopted general comment No. 1 (2009), entitled "Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples", which was published as an annex to that report.

2. The general comment refers to article 42 of the United Nations Declaration, which stipulates that:

> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

The goal of the general comment was to "determine and detail, to some extent, what the obligations of the Permanent Forum are, as laid down in article 42 of the United Nations Declaration and how the Permanent Forum can fulfil those obligations. In order to determine and detail such obligations and actions, one must clarify the legal understanding of the article. This must be discussed on the basis of the status of the Declaration as an international law instrument of a human rights character" (E/2009/43, para. 3).

3. The general comment consisted of 25 paragraphs divided into three sections, the headings of which were "Article 42 as basis for a new function", "The legal character of the Declaration", and "The effect of article 42". The first section concluded that article 42 introduced a new function and responsibility, which should be read in the light of the article as a source of international law.

4. The second section stated at the outset that the Declaration was the most universal, comprehensive and fundamental instrument on indigenous peoples' rights, and the legal framework of the Forum, together with resolution 2000/22 of the Economic and Social Council. It also started that the Declaration was not a treaty and it accordingly did not have the legally binding force of a treaty. However, that did not at all mean that the Declaration was without any binding effect. The adoption of any human rights instrument by the United Nations aspired to some binding force. The legal analysis in that chapter dealt with the extent of the binding value of the Declaration.

5. The third section examined the responsibility and possible authority of the Forum as laid down in the article. How should the Forum fulfil its new obligations according to the Declaration? The general comment stated that the new function assigned to the Forum pursuant to article 42 was far-reaching. In the first place, the Forum should promote not only respect for but also "full application" of the Declaration. Secondly, the Forum should follow up "the effectiveness" of the Declaration, that is, to see whether the realities ("law in action") were in conformity with the written law and decisions ("law in books"), and if not, take necessary actions to close the implementation gap. On the possible methods in that regard, the general comment stated that (E/2009/43, annex, paras. 17 and 18):

> This new and extensive responsibility does not, in the wording of the article, correspond with any authority to accomplish what is required in this regard. The authority of the Forum will accordingly have to be decided by way of a reading of article 42 on the basis of the Declaration as a whole. In this

process of interpretation one has to rely on some principles or guidelines that are within the spirit of the Declaration.

Some accepted guidelines for interpretation will in this case be the workings of the Forum so far, the purpose of article 42 and the normal way of protecting human rights within the United Nations system.

6. The rest of the general comment was an endeavour to carry out such interpretation with a view to the future work of the Forum. The general comment was unanimously adopted in its totality by the Forum members.

B. Discussion in the United Nations Economic and Social Council of the annex to the report of the Permanent Forum (E/2009/43)

7. In July 2009 during its general segment, the Council discussed an agenda item on social and human rights questions, including the report of the eighth session of the Forum. Some States expressed critical views on the general comment in the annex to the Forum report. The following account is based on the meeting summaries dated 30 July 2009 by the Information Service at the United Nations Office at Geneva.

8. In discussing the Forum report, the Council decided to authorize a proposal from the Forum of a three-day international expert group meeting on the theme "Indigenous peoples: development with culture and identity; articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples". In that context, the points of view described in paragraphs 9 to 12 below, were pronounced.

9. Canada was pleased to join consensus on the items under the agenda item. With regard to the text, it was the view of Canada that the comments were based on a mischaracterization of international law. Declarations adopted by the General Assembly were fundamentally different from treaties, which were binding on States. The Forum should not be acting as a treaty-monitoring body, as that was against its mandate. All United Nations organizations should act in accordance with their mandate.

10. The United States of America remained committed to vigorously promoting indigenous rights domestically and abroad. However, they were disappointed that that year's Forum had issued a general comment, styled as an item issued by a United Nations treaty body. As the Forum was not a treaty body, it did not have the authority to issue authoritative interpretations of the Declaration or to develop mechanisms for reviewing countries' follow-up actions with regard to the Declaration.

11. The Russian Federation attached particular importance to ensuring all rights of indigenous peoples. The annex to the report contained an erroneous interpretation of international law. The mandate of the Forum was explicitly defined by the establishing Council resolution, and the Russian Federation was therefore concerned at attempts to change that without approval. The Russian Federation was ready to join consensus on that decision and others, but believed that taking note of the report of the Forum and the adoption of the draft decisions contained therein did not constitute a direct or indirect approval by the Council of the annex to the report.

12. Sweden, speaking on behalf of the European Union, said that the European Union emphasized the importance of the Declaration. In that connection, the European Union considered it imperative for the Forum to act within the mandate given to it under article 42 of the Declaration.

C. Remarks by Forum members

13. At its ninth session (19-30 April 2010) the Forum decided that Forum members Lars-Anders Baer, Bartolomé Clavero Salvador, Michael Dodson and Carsten Smith should prepare a paper that responded to the comments made by certain Member States on the annex to the report of the Permanent Forum on its eighth session (E/2009/43) at the general segment of the substantive session of the Economic and Social Council, in July 2009.

14. The authors of the present report have decided to address some of the statements made by Member States during the Council meeting in July 2009 and agreed that those statements must be noted by the Forum in its future work. However, it is also the duty of the Forum to express its view on the scope of its function in order to clarify the basis and the limits of that future work.

15. Whether the document is styled as a general comment or a general recommendation or comment or has another heading is purely a formal question without any legal consequences. The Forum considers the words "general comment" to be precise with regard to the subject matter of the document, but does not voice any preference in that matter of form. With regard to the substantive points of view that have been raised, the Forum shall, however, pronounce its opinion.

16. Declarations are different from treaties. The United Nations Declaration on the Rights of Indigenous Peoples is not a treaty, as stated clearly in the annex, and it accordingly does not have the binding force of a treaty. However, that does not mean that the Declaration is without any binding effect, as emphasized in the annex. A key point of the annex was the analysis of the scope of the binding value of the Declaration. The annex referred to a number of relevant elements of international law that supported such a binding value, at least for parts of the Declaration.

17. The authors consider it imperative not to confine further discussion on the legal status of the Declaration, and interpretation of the various articles, to contrasting the different legal characteristics between a treaty and a declaration.

18. The interpretations given by the Forum will only have the authoritative effect that the reasoning itself will carry. The Forum cannot develop mechanisms for reviewing countries' follow-up actions with regard to the Declaration outside the mandate laid down in article 42. However, when the Forum has been assigned the task of following up on the effectiveness of the Declaration, it should be considered the duty of the Forum to examine which practice will be the most efficient within the framework of the obligations and limitations of the article.

19. As stated in the annex, the Forum was established pursuant to Economic and Social Council resolution 2000/22. Article 42 does not change that resolution or its implications, but introduced a new additional function and responsibility. That should be read in the light of the article as a source of international law. That is what the annex intended to do.

20. When it is considered imperative for the Forum to act within the mandate given under article 42, the authors fully agree. But the authors add that it is at the same time a principal duty of the Forum to identify the substance of its mandate and how to pursue that in the most appropriate way to realize the rights of indigenous peoples.

D. Conclusion

21. The main conclusion of the authors is that the annex to the 2009 report of the Forum, whether titled "general comment" or not, should be used as a basis for the development of a constructive practice in the Forum as well as in other forums concerned with indigenous rights.